(2)

No. 95-1567

Supreme Court, U.S.
FILED
JUN 6 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF INDIANA,

Petitioner,

vs.

ROSS BRYANT,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

LIST OF INTERESTED PARTIES

All parties to the proceeding in the Court below are named in the caption. Petitioner, State of Indiana, was the only Appellee in the Indiana Supreme Court and the only plaintiff in the state trial court.

Respondent, Ross Bryant, was the only Appellant in the Indiana Supreme Court and the only defendant in the state trial court.

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STATE OF INDIANA,

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Supreme Court of Indiana. The Indiana Supreme Court opinion is reported at 660 N.E.2d 290.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to interpret the Indiana Constitution (Article I, Section 14, on double jeopardy) unless there was an infringement of rights guaranteed by the federal constitution. The Attorney General (General) only claims that there was an expansion of a defendant's rights. Therefore, this case is not justiciable.

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari since the Indiana Supreme Court opinion was in compliance with *Montana Dep't. of Revenue v. Kurth Ranch, 114 S. Ct. 1937 (1994)*, which is controlling, the Fifth Amendment of the Federal Constitution, and Article I, Sec. 14 of the Constitution of Indiana.

Indiana drug laws are as severe as any in the nation. Moreover, it enacted its Controlled Substance Excise Tax in Indiana Code §6-7-3-1 et seq. which contains astronomical monetary tax rates and penalties. This excise tax imposes 100% penalties and felony provisions for non-payment of the tax when due under Indiana Code §6-7-3-11(b). The *Bryant* court found that assessment of this tax was a penalty.[1]

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[1] The Department has reported that it assessed more than $154.8 million in drug taxes in 1384 cases from the time the tax took effect in June 1992 until December 1995, but has collected only $969,545.25, or less than 1 percent of the assessment.

Bryant only differs from *Kurth Ranch* in that the Controlled Substance Excise Tax was assessed and levied upon before he was tried and convicted, which consequently made the criminal trial the second jeopardy. But it is consistent with *Kurth Ranch* since he was twice put in jeopardy for the same offense.

A. Course of Proceedings and Disposition of the Case Below.

Ross Bryant was arrested on August 17, 1992, for possession of marijuana accidentally found in his home by the Grant County Sheriff's Department and formally charged on August 20, 1992, with:

1. Possession of Marijuana, a Class D felony, Ind. Code §35-48-4-11(2);
2. Maintaining a Common Nuisance, a Class D felony, Ind. Code. §35-48-4-13;
3. Possession of Marijuana, a Class A Misdemeanor, Ind. Code §35-48-4-11-(1);

and

4. Possession of Marijuana Without Paying the Excise Tax, a Class D felony under Ind. Code §6-7-3-11(b).

After his arrest, a member of the Grant County Sheriff's Department contacted the Indiana Department of Revenue which assessed the tax on August 17,1992, for an amount of $83,680.00. In addition, he was assessed a 100% penalty for not paying the taxes on the date it was due. Jeopardy attached when Bryant was assessed the tax and the 100% penalty.

Bryant had never been suspected of any drug activity before. When he was arrested on August 17, 1992, he was removed from his house. He posted bond the next day but was not permitted to return to his home until January 12, 1993, because of the state's tax levy.

He was tried on April 19 and 20, 1993, and convicted of the four offenses. He was then sentenced to the Indiana Department of Corrections.

He appealed his convictions to the Indiana Court of Appeals pursuant to Appellate Rule 4(B), but the case was transferred to the Supreme Court pursuant to Appellate Rule 4(D) for the opinion. The Indiana Supreme Court delivered its opinion on December 27, 1995, and it is set out in *660 N.E.2d 290 (Ind. 1995)* followed by four consistent opinions in similar cases, namely: *Clifft v. Ind. Dep't. of State Rev., 660 N.E.2d 310; Hall v. Ind. Dep't. of State Rev., 660 N.E.2d 319; Bailey v. Ind. Dep't. of State*

rev., 660 N.E.2d 322; and Hayse v. Ind. Dep't. of State Rev., 660 N.E.2d 325.[2]

B. Correction of Misstatements in the Petition

The General stated in paragraph 2 of page 3 of her Petition that Respondent pursued none of his statutory administrative remedies. This is not true. The Department of Revenue issued its letter of finding dated August 2, 1993, reducing the tax and weight of the marijuana from 2092 grams to 358.5 grams because the Revenue agents weighed considerable foreign material with it. Appendix A.

Also, Respondent filed a petition before the Indiana Tax Court on August 24, 1993, Cause 49T10-9308-TA-67, which is still pending awaiting the ruling from this Court. Appendix B.

REASONS FOR DENYING THE WRIT

I.

The petition is not justiciable

The petition for the writ filed by the State of Indiana against Ross Bryant is not justiciable. In *Bryant*, the Supreme Court of Indiana found that Bryant's constitutional protection from double jeopardy was violated. The defendant relied on

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[2] These four opinions were based on appeals from the Indiana Tax Court but *Bryant* was an appeal from his criminal convictions.

Montana Dep't. of Revenue v. Kurth Ranch,114 S.Ct. 1937 (1994), to support his double jeopardy claim. The Court borrowed the analysis from *Kurth Ranch*, supra, and held that Bryant's protection from double jeopardy was violated as guaranteed by the Fifth Amendment of the United States Constitution and Article I, Sec. 14 of the Indiana Constitution.

The General now contends that the Court misapplied the *Kurth Ranch* analysis and thereby extended the Fifth Amendment further than the holding in *Kurth Ranch*. Although Bryant disagrees with the General, her contention is irrelevant. Bryant not only relied on the Fifth Amendment of the United States Constitution, but on Art. I, Sec. 14 of the Indiana Constitution, which also protects an individual from being placed twice in jeopardy for the same offense.

It is within the power of a state supreme court to apply higher constitutional standards than are required of the states by the Federal constitution. *Grand Forks v. Grand Forks Herald, Inc.* (1981 ND) 307 N.W.2d 572, 27 ALR 4th 667. Even if this Court finds that the Indiana Supreme Court erroneously extended Bryant's Fifth Amendment protection from double jeopardy, the decision must stand. *Bryant* was not only decided upon by the Fifth Amendment of the Federal Constitution, but upon Art. I. Sec. 14 of the State Constitution. And since it was decided upon by State constitutional principles, deference

must be given to a State Supreme Court while interpreting its own constitution if it chooses to apply higher constitutional standards. *Grand Forks*, supra.

II.

Compliance with *Kurth Ranch*

The decision of the Indiana Supreme Court is in full compliance with the opinion of this Court in *Kurth Ranch*. In fact, this Court recently denied certiorari in *Hall v. Indiana Dep't. of Revenue, 95-1589*, which was handed down by the Indiana Supreme Court as a companion case to *Bryant*.

The General waived a response, but filed her own Petition for a Writ of Certiorari seeking an inconsistent opinion herein.

III.

The General's objection of assessment is merely sequential not substantive

The General doesn't approve of the courts determination that the time of assessment is the proper time for a jeopary to attach.

The only difference between *Kurth Ranch* and *Bryant* is sequential, rather than substantive. In *Bryant*, the State elected to assess a tax on the day of his arrest, and removed him from his home for over four months by a tax levy. The State then proceeded

with a criminal trial eight months later. That was the State's choice. In *Kurth Ranch*, the defendants pleaded guilty first and the State sought the tax later. Therefore, the tax assessment was the second jeopardy; whereas in Bryant's case, the criminal penalty was the second jeopardy.

Other state courts and federal appellate courts are not bound by the Bryant ruling. The federal court decisions cited by the General all related to forfeitures, not drug taxes. The General simply wants this Court to overrule *Kurth Ranch* even though the *Bryant* opinion was also based on the Indiana Constitution, Art. I, Sec. 14 (Double Jeopardy clause).

Petitioner alleged that several other state and federal appellate courts are in conflict with *Kurth Ranch*. If that is the case, those courts should also comply with *Kurth Ranch*. For example, Connecticut distinguished its drug tax to avoid the *Kurth Ranch* decision. *Covelli v. Com'r. of Revenue Services, 668 A.2d 699 (Conn. 1995)*. The Indiana drug tax was found to be similar to the Montana tax which also was found to be a jeopardy.

IV.

Two jeopardies did attach

The General also laments that two jeopardies never attached in *Bryant*. She argues that merely being assessed a drug tax is too premature to constitute being a penalty, and that jeopardy did not

attach since Bryant never paid the tax. The General apparently fails to grasp the concept of double jeopardy. As relied on in *Bryant*, double jeopardy is not about being punished twice for the same offense, but twice being put in jeopardy for the same offense. *Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).* The notion that jeopardy is the risk of being punished, is the very core of double jeopardy jurisprudence. *Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975).* Where risk of determination of guilt exists, jeopardy attaches. *Serfass v. United States, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).*

What the General fails to mention, is that not only was Bryant subjected to a jeopardy because of the risk of determination of guilt by the Department of Revenue, but that Bryant was found guilty when he was served a Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. This judgment enabled the Department to levy on Bryant's property. If jeopardy attached any time other than assessment, the Department could levy several times for the same offense. Therefore, Bryant not paying the tax is irrelevant since jeopardy attached at the time of the assessment.

CONCLUSION

The decision of the Indiana Supreme Court does not threaten or interfere with drug prosecutions as alleged by the General. Defendants in pending criminal prosecutions have already been punished

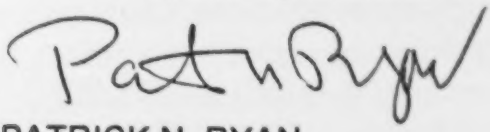
once. *Kurth Ranch* merely explained another facet of double jeopardy, and advised the judiciary that it shall not subject individuals to jeopardy twice for the same offense.

Indiana can resolve its concern by amending the Controlled Substance Excise Tax to a workable tax, increasing the criminal penalty for drug offenses, or merely allowing the Indiana Dep't. of Revenue and law enforcement authorities to decide who should act first.

The General did not brief these concerns for the Supreme Court of Indiana, nor did she file a petition for rehearing outlining these concerns which she is permitted to do under AR 11.

The writ of certiorari should be denied.

Respectfully submitted,



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APPENDIX A -- LETTER OF FINDING CONTROLLED SUBSTANCE EXCISE TAX FOR TAX YEAR 1992 FROM THE STATE OF INDIANA DEPARTMENT OF REVENUE ISSUED AUGUST 2, 1993

STATE OF INDIANA
DEPARTMENT OF REVENUE
LEGAL DIVISION
INDIANA GOVERNMENT CENTER NORTH
100 N. SENATE AVE., ROOM N248
INDIANAPOLIS, 46204-2253

28920748.LOF

LETTER OF FINDING

CONTROLLED SUBSTANCE EXCISE TAX

FOR TAX YEAR 1992

TAXPAYER: ROSS BRYANT
2118 S. PENN ST.
MUNCIE, INDIANA 47302

NUMBER: 92-0748
ISSUED: AUGUST 2, 1993

A telephone conference administrative hearing was held on June 15, 1993 at 10:00 a.m. Eastern Standard Time to hear the protest of Ross Bryant (hereinafter taxpayer) to a controlled substance excise tax assessment. The taxpayer was

represented by attorney Patrick N. Ryan. The hearing officer was R. Scott Partenheimer, Attorney.

ISSUES

I. Controlled Substance Excise Tax - Possession

Authority: IC 6-7-3

The taxpayer protests the Department's determination that he possessed the controlled substance upon which the assessment was based.

II. Controlled Substance Excise Tax - Weight

The taxpayer protests the weight measurement of the controlled substance.

STATEMENT OF FACTS

On August 17, 1992 Agent Rick Albrecht of the Indiana Department of Revenue Criminal Investigation Division assisted Grant County Police during a search of the residence owned by Ross Bryant. The search produced approximately 130 marijuana plants.

The marijuana was taken to the Grant County Sheriff's Department where it was weighed by Agent Albrecht. The total weight was 2,092 grams.

Appendix A

On the same day, Agent Albrecht delivered to the taxpayer a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand. The assessment was based on the taxpayer's failure to pay the controlled substance excise tax on the marijuana found in his possession.

On April 20, 1993 the taxpayer was convicted of: (1) possession of marijuana, a class D felony, (2) maintaining a common nuisance a class D felony, (3) possession of marijuana, a class A misdemeanor, and (4) failure to pay the controlled substance excise tax, a class D felony.

I. Controlled Substance Excise Tax - Possession

DISCUSSION

The taxpayer protests the Department's determination that he possessed the controlled substance upon which the assessment was based. In support of this claim, taxpayer asserts that the agents of the State of Indiana illegally entered and search his home and "presumably placed any drugs which may have been found on the premises."

IC 6-8.1-5-1 provides that notice of a proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests on the person against whom the proposed assessment is made. The taxpayer has not

provided any evidence to support his assertion. Furthermore, the taxpayer was found guilty in the Grant County Circuit Court of possession of the marijuana on which the assessment was based.

FINDING

The taxpayer's protest is denied.

II. Controlled Substance Excise Tax - Weight

DISCUSSION

The taxpayer protests the weight measurement of the controlled substance. The taxpayer asserts that the assessment should be based on a weight of 358.5 grams rather than 2092 grams. In support of this assertion taxpayer submitted an Indiana State Police "Report of Laboratory Examination" which states that the marijuana had a net weight of 358.5 grams. Taxpayer explained that the discrepancy exists because the Revenue agent weighed the stalks and stems of the marijuana plants while the state police weighed only the leafy substance.

IC 35-48-1-1 defines marijuana:

> "Marijuana" means any part of the plant genus Cannabis whether growing or not; the seeds thereof; the resin extracted from any part of the plant, including hashish and

> has oil; any compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom); or the sterilized seed of the plant which is incapable of germination. (emphasis added).

Since the stalks of the marijuana plant are specifically excluded from the definition of marijuana, the stalks are not subject to Indiana's Controlled Substance Excise Tax.

FINDING

Taxpayer's protest is sustained. The Criminal Division is directed to adjust the assessment to reflect a weight of 358.5 grams rather than 2092 grams.

REQUEST FOR REHEARING

Under 45 IAC 15-5-5, the taxpayer has the right to request a rehearing. However, rehearings are granted only under unusual circumstances. Such circumstances are typically the existence of facts not previously known that would have caused a different result if submitted prior to issuance of the Letter of Findings.

Appendix A

A request for rehearing should be made within thirty days from the issue date of the taxpayer's Letter of Findings and should be sent to the Protest Review Board, Indiana Department of Revenue, Legal Division, Tax Appeals Section, P. O. Box 1104, Indianapolis, Indiana, 46206-1104. Upon receipt of the request for rehearing, the Department will review the respective file and the rehearing request to determine if sufficient new information has been presented to warrant a rehearing. The Department will then notify the taxpayer in writing whether or not a hearing has been granted. In the event a rehearing is granted, the taxpayer will be contacted to set a rehearing date.

If the request for rehearing is denied, the taxpayer may pay the assessment and file a Claim for Refund with the Protest Review Board at the above address. A copy of the Letter of Findings should be attached to the Claim for Refund. If the Claim for Refund is denied, all administrative remedies will be exhausted and the taxpayer's only recourse is to file an appeal with the Indiana Tax Court pursuant to IC 6-8.1-9-1(c). Alternatively, the taxpayer may appeal the decision of the Letter of Findings with the Indiana Tax Court.

INDIANA DEPARTMENT OF REVENUE
Legal Division

s/ R. Scott Partenheimer
Attorney

Appendix A

s/ Teresa L. Modlin
Supervisor of Tax Appeals

s/ Robert Robinson
Administrator

APPENDIX B -- ORDER OF THE INDIANA TAX COURT FILED MARCH 27, 1996

IN THE
INDIANA TAX COURT
Case No. 49T10-9308-TA-00067

TITLE OF CASE: ROSS BRYANT, Petitioner v. INDIANA DEPARTMENT OF STATE REVENUE, Respondent

Brief Statement of Order

The Court is advised that the Office of the Indiana Attorney General is filing a petition of certiorari to the Supreme Court of the United States in a related case. The related case and further proceedings in this case should be stayed pending action by the Supreme Court of the United States on said petition for certiorari. Accordingly, the proceedings are stayed and the parties are ordered to file status reports on November 1, 1996 or sooner if the Supreme Court of the United States should act on said petition for certiorari.

SO ORDERED this 27 day of March, 1996.

s/ Thomas G. Fisher
Judge, Indiana Tax Court

Appendix B

Distribution:

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